

Exhibit D



U.S. Department of Justice

*United States Attorney
Southern District of New York*

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March 9, 2009

BY FACSIMILE

Honorable George B. Daniels
United States District Judge
Southern District of New York
United States Courthouse
500 Pearl Street, Room 630
New York, New York 10007

Re: In re Terrorist Attacks of September 11, 2001
03 MDL 1570 (GBD) (FM)

Dear Judge Daniels:

We write respectfully on behalf of the United States (the "Government") in opposition to the motion for declaratory relief filed on February 23, 2009, on behalf of all plaintiffs in the above-referenced litigation ("plaintiffs"). The Court should reject plaintiffs' request that the Court consider in camera the documents they submitted ex parte in connection with defendant National Commercial Bank's motion to dismiss and plaintiffs' related request for jurisdictional discovery. Plaintiffs should not be allowed to use or benefit from classified and otherwise restricted documents that they are not, and never were, authorized to possess.

BACKGROUND

A. Motley Rice's Submission of the Documents to the Court

As set forth in plaintiffs' motion, on August 25, 2008, the law firm of Motley Rice, counsel for the Burnett plaintiffs, submitted a set of 55 documents (collectively, the "Documents") to Magistrate Judge Maas and Your Honor ex parte, and asked Judge Maas to review the Documents in camera for purposes of resolving a pending motion to dismiss and request for jurisdictional discovery. See Declaration of Robert T. Haefele dated February 23, 2009 ("Haefele Decl."), Exh. D. Mr. Haefele's cover letter submitting the Documents to the Court stated:

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Based on the sensitive nature of the documents, including the possibility that the documents could bear information that is in some manner classified or otherwise inappropriate for dissemination either to the public or to potential targets of governmental investigations, we are requesting that the Court accept them under seal and examine them ex parte and in camera.

Id. (citation omitted). Mr. Haefele's August 25, 2008 letter to the Court was not copied to counsel for the Government, nor did the letter provide any indication that the Documents either had been or would be provided to the Government for review. See id.

On August 26, 2008, counsel for defendant National Commercial Bank ("NCB") wrote to Judge Maas, objecting to the Burnett plaintiffs' request that the Court consider the Documents ex parte and in camera. See Haefele Decl., Exh. G. Among other things, NCB contended that the Documents should have been disclosed in response to earlier discovery requests.*

B. Motley Rice's Provision of the Documents to the Government

On August 27, 2008, after receiving NCB's objection to the Burnett plaintiffs' submission of the Documents to the Court, Motley Rice sent the documents to counsel for the Government. See Haefele Decl., Exh. F. Mr. Haefele's letter to Government counsel did not indicate that the Documents were potentially classified or otherwise sensitive, nor did it seek review of the

* Motley Rice has advised the Government that it has been unable to determine when or from whom the Documents were received by the firm. It appears, however, that Motley Rice has had the Documents since at least 2007, when Motley Rice responded to NCB's contention interrogatories. See Haefele Decl., Exh. G (August 26, 2008 letter contending that "if plaintiffs' documents relate to their jurisdictional contentions, then the plaintiffs were required to disclose them to NCB nearly a year ago in response to the NCB contention discovery requests that this Court authorized"); Exh. H (August 27, 2008 letter responding that "the Plaintiffs, at the time, anticipated using the documents to craft discovery requests, rather than using the sensitive documents, themselves").

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Documents by the Government. The letter stated simply:

Please find enclosed herewith a set of documents that we have produced to the Court in the In re Terrorist Attacks on September 11, 2001 Litigation, 03 MDL 1570 (GBD) (FM), for in camera and ex parte review. We have not and do not intend to produce them or use them in the In re September 11 Litigation, 21 MC 101 (AKH).*

If you have any questions about what was submitted for the Court's review, please do not hesitate to contact me.

Id.

Upon even a cursory review of the Documents, it was readily apparent that many of them bore classification markings and accordingly should be treated as classified national security information. We therefore immediately forwarded the Documents to the relevant Government agencies for review. We also contacted the Court and requested that Judge Maas refrain from reviewing the Documents until we could advise the Court of their classification status, and until arrangements could be made to obtain any necessary security clearances. Haefele Decl., Exh. F (citing 28 C.F.R. § 17.46(c)). We further requested that Motley Rice immediately collect all paper and electronic versions of the Documents, safeguard them during the pendency of the Government's review of the Documents, and refrain from any further dissemination of the Documents. Id.

We understand that, shortly thereafter, the Court provided the Documents in its possession (including the Documents sent by Motley Rice to both Your Honor and Judge Maas) to a security specialist with the Department of Justice's Litigation Support Section, who in turn secured the Documents in the Court's facility for storage of classified information, where the documents remain.

* Motley Rice also represents plaintiffs in the consolidated tort litigation pending before Judge Hellerstein, entitled In re September 11 Litigation, 21 MC 97 & 101 (AKH), in which the Government has intervened for the purpose of protecting sensitive (but unclassified) aviation security information sought in discovery.

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C. The Government's Review and Motley Rice's Return of the Documents

Since August 2008, the Government has been engaged in the process of reviewing the classification status of the Documents. This effort has been complicated, and in some cases severely hampered, by the fact that many of the Documents contain unexplained redactions that make it extremely difficult to determine their source. In addition, the review has required the participation and coordination of multiple Government agencies. To date, the Government has confirmed that Documents 1-49 (referring to the tabs by which Motley Rice organized the Documents) remain classified or otherwise restricted from public disclosure. The review of Documents 50-55 remains pending.

Following discussions with Motley Rice throughout the fall and winter, on February 24, 2009, the firm provided its remaining copies of Documents 1-49 to the Government, and confirmed in writing that it had "either turned over or destroyed all originals and all copies (including both electronic and paper versions) of documents 1-49, and any documents derived from documents 1-49." See attached letter dated February 24, 2009.* Motley Rice further confirmed that Documents 50-55 remain secured at the firm pending the completion of the Government's review of those Documents.

On February 23, 2009, the day before Motley Rice provided its copies of Documents 1-49 to the Government, plaintiffs filed the instant motion for declaratory relief. In their motion, plaintiffs request that the Court enter a declaratory judgment that (1) Your Honor has security clearance and authority to keep and review the Documents, (2) Your Honor will keep and review the Documents in camera, (3) after conducting such in camera review of the Documents, Your Honor will determine whether additional jurisdictional discovery against defendant NCB is warranted, and (4) plaintiffs may use

* By letter dated October 1, 2008, the Government requested that Motley Rice immediately turn over all of the Documents because it had been confirmed that they contained classified information. Motley Rice did not return the Documents at that time, as requested, but indicated that it would return specific documents that the Government determined were classified.

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"unclassified facts" from the Documents, "to the extent they are available," in opposing NCB's renewed motion for lack of personal jurisdiction. See Plaintiffs Memorandum of Law in Support of Motion for Declaratory Relief ("Pl. Mem.") at 9.

THE GOVERNMENT'S POSITION

As a preliminary matter, the Government does not object to the Court's retaining custody of the Documents pending its determination of plaintiffs' motion. As noted, we understand that the Court has provided the Documents to a security specialist from the Department of Justice's Litigation Support Section, for appropriate storage in the Court's secure facility.

The Government also agrees that Your Honor may view classified materials without receiving a security clearance from the Executive Branch. See 28 C.F.R. § 17.46(c). Court staff, including law clerks, by contrast, must undergo a background investigation and other necessary procedures prior to reviewing such materials. Id.

Here, however, the Court should not review the documents because they are not properly before the Court. The Documents were provided to Motley Rice in violation of the Executive Order governing handling of classified national security information, and potentially in violation of federal criminal law as well as other prohibitions on the disclosure of restricted Government information. The Government opposes any effort by plaintiffs to use the Documents for any purpose, and respectfully requests that plaintiffs' motion for declaratory relief be denied.*

A. The Court Should Decline to Review the Documents In Camera

The vast majority of Documents 1-49 contain classified national security information. By definition, classified information is information the unauthorized disclosure of which could reasonably be expected to cause damage to national security. See Executive Order 12,958, 60 Fed. Reg. 19,825,

* Because the Government has not completed review of Documents 50-55, they should be treated in the same manner as Documents 1-49, pending the completion of the Government's review.

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19,836 (Apr. 17, 1995), as amended by Executive Order 13,292, 68 Fed. Reg. 15,315 (Mar. 25, 2003) ("Executive Order 12,958" or the "Executive Order"). The classification level of an individual document varies based on the harm that could reasonably be expected to result from the information's unauthorized disclosure: "CONFIDENTIAL" denotes information that, if released, could reasonably be expected to cause damage to the national security; "SECRET" denotes information that, if released, could reasonably be expected to cause serious damage to the national security, and "TOP SECRET" denotes information that, if released, could reasonably be expected to cause exceptionally grave damage to the national security.

Classified information generally belongs to the United States, and the Executive Branch has discretion to determine who will be granted access to it. See Dep't of the Navy v. Egan, 484 U.S. 518, 527 (1988). Under Executive Order 12,958, access to classified information is limited to persons (1) as to whom a favorable determination of eligibility for access has been made by an agency head or his or her designee, (2) who have signed an approved non-disclosure agreement, and (3) who have a "need-to-know" the information. Id. § 4.1(a). A "need-to-know," in turn, is defined by the Executive Order as "a determination made by an authorized holder of classified information that a prospective recipient requires access to specific classified information in order to perform or assist in a lawful and authorized governmental function." Id. § 6.1(z).

Here, plaintiffs would not have satisfied the requirements prescribed by the Executive Order for access to classified information contained in the Documents. The attorneys at Motley Rice had not been determined by an agency head or his or her designee to be eligible for access to classified information, nor had they signed approved nondisclosure agreements. Further, because they did not require access to the Documents "in order to perform or assist in a lawful and authorized governmental function," they had no "need-to-know" the information within the meaning of the Executive Order. In sum, the Government has not afforded plaintiffs or their counsel any right to access or use the Documents, which are the property of the United States.

The provision of the Documents to Motley Rice thus constituted a security violation under Executive Order 12,958. In addition, this act may have implicated federal criminal law.

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See, e.g., 18 U.S.C. § 793. To the extent the Documents also contain information that, while unclassified, is privileged or otherwise protected from public release, their disclosure to Motley Rice may have contravened other applicable regulations and restrictions. See, e.g., 28 C.F.R. § 16.22 (example of general agency prohibition on production or disclosure of material within agency's files without prior agency approval).

Because Motley Rice did not have authorized possession of the Documents in the first instance, and may have received them as a result of possible criminal activity, plaintiffs should not be permitted to use them in any fashion. If Documents 1-49 had been stolen from the United States, by a rogue employee or by Motley Rice itself, that surely would not give plaintiffs any right to use the information. Yet, that is tantamount to what plaintiffs are requesting here -- that they be permitted to benefit from the unauthorized and potentially criminal disclosure of information to Motley Rice. Notably, the cases cited by plaintiffs for the proposition that the Court may review the Documents in camera, see Pl. Mem. at 7, did not involve a private party seeking to use classified documents to which that party did not have authorized access.

Allowing civil litigants to use classified information that they have obtained through unauthorized means would confer a benefit on those litigants who improperly obtain and disclose national security information, and thereby create problematic incentives. In addition, as courts have recognized, even a court's in camera consideration of classified information poses a risk of inadvertent disclosure and consequent harm to national security. See, e.g., United States v. Reynolds, 345 U.S. 1, 10 (1953); Sterling v. Tenet, 416 F.3d 338, 348 (4th Cir. 2005).

The Court accordingly should deny plaintiffs' request that the Court review the Documents in camera.

B. Plaintiffs May Not Use Purportedly "Unclassified Facts" Contained Within the Documents

With regard to plaintiffs' request to use "unclassified facts" purportedly contained within the Documents, there are well-established mechanisms in place for obtaining information from the Government. In addition to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, most federal agencies have promulgated regulations governing requests for documents and

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information for use in litigation to which the Government is not a party. See, e.g., 28 C.F.R. § 16.21(a) (Department of Justice regulations setting forth "procedures to be followed with respect to the production or disclosure of any material contained in the files of the Department, any information relating to material contained in the files of the Department, or any information acquired by any person while such person was an employee of the Department as a part of the performance of that person's official duties or because of that person's official status"); see also United States ex rel. Touhy v. Regan, 340 U.S. 462, 468 (1951) (upholding validity of such regulations).

Motley Rice is familiar with both FOIA and agency Touhy regulations, having employed both in In re September 11 Litigation to obtain documents from the Government relating to pre-September 11 aviation security and the FBI's investigation of the September 11 attacks. Cf. United States v. Moussaoui, 483 F.3d 220, 237 (4th Cir. 2007) (noting, in decision reversing district court order granting access to Burnett plaintiffs, among others, to information provided to attorneys representing criminal defendant Zacarias Moussaoui, that plaintiffs could seek discovery of government information in ordinary course under Rule 26 of the Federal Rules of Civil Procedure).

FOIA and agency Touhy regulations, moreover, contain defined procedures and protections to ensure that classified and privileged information, and information otherwise inappropriate for public disclosure, is not released. See, e.g., 5 U.S.C. § 552(b) (setting forth exemptions from disclosure for, among other things, classified national security information, law enforcement information, and otherwise privileged information); 28 C.F.R. § 16.26(a)(2), (b)(3)-(5) (prohibiting disclosure of classified or law enforcement privileged information); see also Touhy, 340 U.S. at 468 ("When one considers the variety of information contained in the files of any government department and the possibilities of harm from unrestricted disclosure in court, the usefulness, indeed the necessity, of centralizing determination as to whether subpoenas duces tecum will be willingly obeyed or challenged is obvious."). Motley Rice should not be permitted to circumvent these procedures and protections by submitting classified and otherwise restricted Government documents to the Court -- which documents the firm had no authority to possess -- without the Government's knowledge or consent.

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For these reasons, we respectfully request that the Court deny plaintiffs' request for declaratory relief relating to the Documents. We thank the Court for its consideration of this submission.

Respectfully,

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Encl.

cc: Hon. Frank Maas, United States Magistrate Judge (by facsimile)
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